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IN THE

Supreme Court of the United States

JMC TELECOM, L .C,

Petitioner,

v.

AT&T CORP.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The decision below raises none of the questions the petition purports to present. In claiming otherwise, petitioner mischaracterizes the Third Circuit's rulings on petitioner's breach of tariff and antitrust claims, and also misstates the allegations underlying petitioner's antitrust claims.

Petitioner's claim that the Third Circuit deemed a tariff commitment "unenforceable because the customer's claim relates to the quality of service," Pet. at 6, is patently untrue. Citing a tariff provision in which AT&T represented that it would use no "participating carriers" in providing service, petitioner argued that AT&T had breached a promise to provide service "*only* over AT&T facilities." *Id.* (emphasis added). The Third Circuit did not deem this tariff commitment unenforceable. It found that AT&T's use of a local Philippine carrier to complete calls to that country did not violate the tariff, because the local carrier was not a "participating carrier," as the Federal Communications Commission (FCC) has construed that regulatory term of art. This decision is unassailably correct, and raises no issues warranting this Court's review.

Petitioner also claimed that AT&T had breached alleged contractual commitments by failing to provide "world class" service or adequate customer support. See Pet. App. 10a-11a. These alleged promises, however, are not in the tariff, and the Third Circuit held that *non-tariffed* commitments are unenforceable under the filed tariff doctrine. This ruling does not conflict with this Court's decision in *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214 (1998), but rather was compelled by that decision.

As for its antitrust claims, petitioner simply ignores concessions it made below that fatally undermine those claims. It insists that it was "not a distributor of AT&T's telecommunications service," Pet. at 10. But petitioner told

the Third Circuit precisely the opposite, and properly so: petitioner not only re-sold AT&T service, it used the AT&T brand to market its cards, and it was entitled to advise customers that the service was provided over AT&T facilities. Based on petitioner's concession that it was a distributor of AT&T service, the Third Circuit properly held that the alleged maritime market restriction was a vertical, non-price restraint and thus not subject to *per se* analysis under the Sherman Act.

Petitioner also claims that, in affirming the dismissal of its market division claim, the Third Circuit failed to accept allegations that this alleged restriction resulted from concerted action. But the Third Circuit did not deem the alleged market division a unilateral act. Rather, it affirmed dismissal of a *different* antitrust claim—one petitioner predicated on AT&T's refusal to lower rates—as a legally invalid challenge to permissible unilateral action.

BACKGROUND

1. Petitioner was a novice company engaged in marketing and distributing prepaid calling cards. A prepaid calling card gives end-users a preset amount of telecommunications service. Under its business plan, petitioner would purchase such service (at a bulk discount) from facilities-based carriers, then sell prepaid cards for that service to retailers in the maritime sector, who would sell the cards to end-users.

In September 1998, petitioner agreed to purchase AT&T prepaid calling card service. Petitioner executed a "Contract Tariff Order Form," which incorporated by reference AT&T's Tariff No. 1. After receiving this order form, AT&T filed Contract Tariff No. 10344 with the FCC. The Contract Tariff established the price for the calling cards and associated service, and gave petitioner a 35% discount on each purchase. In exchange, petitioner agreed to purchase a minimum amount of service for each of the three years the Contract Tariff would be in effect. Petitioner further agreed that if it

failed to sell the required amount of service, it would pay a "shortfall" penalty.

Between September and December 1998, petitioner sold more than $1 million in prepaid calling cards using AT&T service. During the first weeks of the service, however, some end-users reported problems, typically in completing a call to the Philippines.[1] As petitioner acknowledged, these service issues were resolved by December 1998.

The difficulty in completing these calls resulted from problems in the network of the local Philippine carrier AT&T had contracted with to complete calls in that country. Because AT&T could not (and still cannot) complete calls throughout the world using only its own facilities, AT&T had to rely on other carries to complete calls. For example, even for domestic calls, AT&T typically handed off the call to a local exchange carrier, such as Verizon, for completion. For calls to a foreign country, AT&T routed the call to another carrier for completion in that foreign country.

Although historically AT&T had been required to use monopoly carriers in many countries, several of these markets became competitive in the 1990s. This created opportunities for low-cost routing, and the FCC encouraged carriers to take advantage of these opportunities to reduce rates to consumers. *In re International Settlement Rates*, 12 FCC Rcd. 19806, ¶¶ 9-12 (1997), *aff'd sub nom. Cable & Wireless PLC* v. *FCC*, 166 F.3d 1224 (D.C. Cir. 1999). The call completion difficulties petitioner's end-users experienced resulted from AT&T's use of one such low-cost carrier in the Philippines, Pacific Gateway Exchange ("PGE").

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[1] Petitioner also claimed that AT&T's customer service was not sufficiently responsive; that certain instructions on the cards were not accurate; that some cards lacked a "product code"; and that a handful of cards were being charged even though the call supposedly did not connect.

Although AT&T engaged carriers, such as PGE, to complete calls, those carriers did not bill petitioner or its end-users or assume responsibility to those customers for any aspect of the service. Instead, AT&T alone billed for the calls at issue in this case. And AT&T was solely responsible for the "end-to-end" service offered under its own tariffs.

Between September 1998 and March 1999, petitioner ordered service for 258,000 prepaid cards, and received invoices totalling $2,375,750.75. Petitioner paid AT&T only $400,000. In February 1999, petitioner decided that it would make no further payments to AT&T, but did not tell AT&T. Thereafter, petitioner activated additional cards and tried to order 100,000 additional PINs (*i.e.*, cards) in late April 1999. Consistent with its tariffed rights, AT&T refused to provision the latter order until petitioner paid its bill. Petitioner made no payment and, in June 1999, AT&T sued for the unpaid tariffed charges. Petitioner subsequently counter-claimed. When petitioner later failed to meet its annual revenue commitment for the first year, AT&T assessed shortfall charges, which petitioner also failed to pay.

2.a. In March 2003, the district court granted AT&T's motion to dismiss that portion of petitioner's counterclaim that alleged a conspiracy to restrain trade in violation of § 1 of the Sherman Act. Accepting petitioner's factual allegations as true, the district court found that petitioner had not alleged a conspiracy or concerted action necessary to state a *per se* Section 1 claim. Instead, it found that petitioner alleged unilateral conduct involving a vertical, non-price "restraint" that could not give rise to a *per se* violation of the Sherman Act. Pet. App. 57a-62a.

After discovery, the district court granted AT&T summary judgment on petitioner's surviving counterclaims and on AT&T's affirmative claims. The court concluded that petitioner's state-law claims for breach of contract, fraud, negligent misrepresentation, and breach of the covenant of good faith and fair dealing were preempted by the

Communication Act and barred by the filed tariff doctrine. The court noted that petitioner's "state-law claims in effect challenge the reasonableness of the filed rate by challenging, *inter alia*, the quality of service provided. This is precisely the type of challenge the filed rate doctrine prevents." *Id.* at 28a-31a.

The district court likewise dismissed petitioner's federal breach of tariff claims. Many of these claims rested on alleged breaches of promises "that do not appear in either Tariff No. 1 or the Contract Tariff," and were therefore unenforceable. *Id.* at 32a. The court also concluded that AT&T's use of PGE to transport calls to the Philippines did not breach its representation in the Contract Tariff that there would be no "participating carriers" involved in the service. The court ruled that a "participating carrier" is not a carrier that simply has some role in the completion of a call, as petitioner claimed, but is instead a "'carrier subject to the [FCA] that publishes a tariff containing rates and regulations applicable to the portion o[f] through service it furnishes in conjunction with another subject carrier.'" *Id.* at 33a (first alteration in original) (quoting 47 C.F.R. § 61.3(z)). The court found that PGE did not satisfy the regulatory definition of a participating carrier because it did not provide service to petitioner's customer pursuant to a published tariff; rather, it provided service to AT&T pursuant to a contract with AT&T. *Id.*

Finally, the court found that petitioner's claims that AT&T violated seven other tariff provisions failed as a matter of law, because these provisions did not promise petitioner any particular quality of service (such as a particular call completion rate), as petitioner mistakenly believed. *Id.* at 34a-37a.[2] In the absence of any breach of an express tariff

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[2] The district court held that one provision of the tariff did guarantee that petitioner's customers would have "foreign origination capability,"

provision, petitioner's complaints regarding poor service were "functionally equivalent to a claim of unreasonable rates" and thus barred under the filed tariff doctrine. *Id.* at 31a-32a (citing *Central Office Tel.*, 524 U.S. at 223).

The district court granted AT&T summary judgment on its claim against petitioner for failure to pay nearly $2 million in billed, tariffed services, and approximately $5.6 million in billed, tariffed shortfall charges. The court rejected petitioner's claim that it was not obligated to pay because of AT&T's alleged breaches, ruling that a "state common-law contract defense" could not "excuse[] performance of a filed federal tariff." *Id.* at 41a. Moreover, these purported excuses were based on promises outside the tariff and were therefore barred under the filed tariff doctrine. *Id.*

b. The Third Circuit affirmed. It noted that petitioner had asserted "two violations of the Sherman Act," the first based on AT&T's "refus[al] to lower the rates assessed" petitioner, and the second based on an alleged "scheme to divide the market between maritime and non-maritime customers." *Id.* at 6a-7a. The Third Circuit dismissed the first of these claims—*i.e.*, AT&T's allegedly unlawful refusal to lower its rates—because petitioner had "not alleged action by other distributors in concert with AT&T." *Id.* at 7a. Instead, petitioner had "alleged only unilateral action by AT&T," which could "not serve as a violation of the Sherman Act." *Id.* at 7a-8a (citing *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). With respect to petitioner's second claim, the lower court held that, insofar as AT&T had allegedly restricted petitioner to selling AT&T service in the maritime market, this was a "[v]ertical, non-price restraint[]" imposed by a supplier and therefore subject to rule of reason analysis, not *per se* condemnation. *Id.* at 8a-9a.

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but found that petitioner's own evidence established that AT&T had met this commitment. Pet. App. 32a-33a.

Turning to petitioner's breach of tariff claims, the Third Circuit noted that many were based on claims that AT&T had failed to provide "'world class dependability'" or had provided "poor customer service." *Id.* at 10a. The court of appeals held that these claims were barred by the filed tariff doctrine, because petitioner was claiming an entitlement to a level of service that was "not spelled out in the tariff" itself. *Id.* at 11a. Among the claims so barred was petitioner's contention that AT&T had failed to provide foreign origination capability. The record demonstrated that customers' difficulty in placing such calls stemmed from a lack of proper written instructions on the cards concerning how to make them. The court of appeals held that "[t]he quality of the written instruction on the card, and the corresponding 'ease of use,' is beyond the terms of the tariff," and thus barred by the filed tariff doctrine. *Id.* at 12a.

By contrast, to the extent petitioner claimed that AT&T had breached a tariffed promise not to use any "participating carriers," the Third Circuit did not deem the promise unenforceable. It ruled instead that AT&T had not actually breached it. Because "participating carrier" is a regulatory term of art, the court looked to the FCC definition and a series of agency decisions applying the term. From this, it concluded that a "participating carrier" arrangement is an "'end-on-end' service arrangement . . . in which each carrier participating establishes a separate rate for its segment of the service." *Id.* at 14a. Such an arrangement differs from an "end-to-end" arrangement in which a carrier establishes "a rate for the entire transmission and the customer pays a single uniform rate to one carrier for completing a call." *Id.*

The court concluded that this FCC interpretation deserved *Chevron*-style deference. *Id.* at 15a. Applying that meaning here, the court found that PGE was not a participating carrier because it "did not publish a rate applicable to the portion of through service it provided to AT&T for [petitioner's] traffic"; instead, AT&T charged petitioner's customers a

single end-to-end rate that was "not a direct function of [PGE's] price." *Id.* at 14a-15a. Accordingly, PGE "was not an 'other participating carrier,' and, consequently, AT&T did not violate the tariff by failing to list [PGE]" as one. *Id.* at 15a.

Finally, the court of appeals affirmed the grant of summary judgment to AT&T on petitioner's state law claims and AT&T's claim for non-payment. It agreed that petitioner's state law claims were barred by the filed tariff doctrine, as were its excuses for not paying accurate tariffed charges. *Id.* at 16a-17a. Petitioner's subsequent petition for rehearing en banc was denied without dissent. *Id.* at 64a-65a.

REASONS THE PETITION SHOULD BE DENIED

The Third Circuit's entirely correct and fact-bound rulings in this case are based on well-settled legal principles, do not conflict with the decisions of this or any other court, and raise no issues worthy of review. Indeed, the decision does not even raise the three issues petitioner seeks to present.

1. According to petitioner, the Third Circuit ruled that "a carrier is immune when it fails to provide the service *specified in the tariff* because the customer's complaint relates to the quality of service." Pet. at 6 (emphasis added). Based on this characterization of the decision below, petitioner describes the first question presented as whether a carrier's "failure to deliver the specific brand of service *called for in a filed tariff* is unenforceable because the customer's claim relates to the quality of service." *Id.* (emphasis added). But as even a cursory review of the decision below makes clear, the Third Circuit announced no such principle.

Throughout the proceedings below, petitioner made the utterly implausible claim that AT&T had guaranteed that calls "would be handled over AT&T's telecommunications network *exclusively*." Appellant's Op. Br. at 10, *AT&T Corp. v. JMC Telecom, LLC*, No. 05-1304 (filed May 9, 2005)

("JMC Br.") (emphasis added). Petitioner principally argued that AT&T provided this "assur[ance]" (as well as alleged guarantees of a 99.99% call completion rate) in oral agreements. See *id.* Both lower courts recognized, however, that the filed tariff doctrine bars enforcement of alleged oral promises precisely because they purport to guarantee a level of service that is *not* "specified in the tariff." Petitioner does not challenge that ruling, which is compelled by *Central Office Telephone*.

Apparently recognizing the fatal import of *Central Office Telephone*, petitioner also sought to ground its "exclusive network" claim in the language of the tariff itself. Just before the close of discovery, it claimed that AT&T's representation in the Contract Tariff that there would be no "participating carriers" constituted a promise to complete calls exclusively over the AT&T network. The Third Circuit did not suggest that this tariffed promise was unenforceable or that AT&T could breach it with impunity because it related to the quality of service. Rather, the court concluded that PGE was not a "participating carrier" within the meaning of that term and that AT&T's use of this local carrier did not breach the tariff.

This conclusion—which petitioner does not even mention let alone challenge—is plainly correct, and flatly refutes petitioner's claim that "the service *specified in the tariff*" required AT&T to complete calls entirely over its network.[3] The reality, which petitioner refuses to acknowledge, is that the Third Circuit did not deem any tariffed promise "unenforceable." It simply concluded that the tariff did not

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[3] Nor can such a promise be derived from the tariff provision permitting resellers to inform customers "that calls placed using the AT&T Prepaid Card account number will be carried over AT&T's facilities." *See* JMC Br. at 24 (quoting tariff provision § 2.2.5). This provision does not state that calls would be carried *exclusively* over AT&T facilities, which is likely why petitioner did not even cite this provision in opposing AT&T's motion for summary judgment in the district court, and thereby waived the claim below.

promise the level of service to which petitioner claimed to be entitled. Accordingly, the decision does not raise the first question petitioner purports to present.

2. Nor does that decision raise either of the antitrust issues petitioner asks this Court to address. Both claims depend on petitioner's assertion that it "was not a distributor of AT&T's telecommunications service under the antitrust laws." Pet. at 10. But this assertion is demonstrably wrong. Petitioner's Counterclaim stated that AT&T provided the prepaid telecommunications service, and that JMC distributed cards with that service. JMC Counterclaim ¶¶ 2, 3 and 6. Petitioner repeatedly told the Third Circuit that it was a "wholesaler" and "distributor" of AT&T's service. JMC Br. at 10, 15, 51. Indeed, its cards were "co-branded with AT&T's . . . logo," *id.* at 15; see also *id.* at 9 (noting that the "AT&T logo is imprinted on the phone card"), and it was entitled to "inform its subscribers that calls placed using the AT&T Prepaid Card account number will be carried over AT&T's facilities." *Id.* at 24 (internal quotation marks omitted).

Accordingly, the Third Circuit was plainly correct in ruling that any alleged market restriction was a vertical, non-price restraint imposed by a supplier, Pet. App. 8a-9a, not a division of markets by horizontal competitors. As the Third Circuit noted, other circuits and the Department of Justice uniformly agree that where a supplier and distributor compete at the distribution level, vertical non-price restraints are not *per se* unlawful and are instead analyzed under the rule of reason. *Id.* at 9a. And that uniform approach is consistent with this Court's admonition that courts should be slow "to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986).

The alleged marketing restriction at issue here, moreover, is vastly different from the allocation of markets deemed

unlawful in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam). That case involved an agreement in which "the two main providers of bar review courses in Georgia" agreed to stop competing against each other in that market. Instead, BRG became the exclusive licensee of HBJ's bar review program in Georgia, HBJ agreed that it would not compete with BRG in Georgia, and BRG agreed not to compete with HBJ outside Georgia. *Id.* at 47. As a result of this agreement, there was a direct loss of inter-brand competition, both inside and outside of Georgia. Here, by stark contrast, the alleged restriction resulted in no loss of inter-brand competition. Instead, a novice company that had never competed anywhere was permitted to introduce *intra*brand competition in AT&T calling card service in one market, but allegedly prevented from introducing *intra*brand competition outside that market. The Third Circuit's refusal to subject such an alleged restriction to *per se* condemnation does not conflict with *Palmer* or any other decision of this Court, is consistent with the uniform approach of other circuits, and raises no issues warranting review.

Finally, the decision below does not raise the third question petitioner purports to present, for the simple reason that the Third Circuit did not affirm dismissal of petitioner's market division claims based on a conclusion that this alleged restriction involved only unilateral action. Instead, as noted above, the lower court affirmed the dismissal of a *separate* antitrust claim—one that petitioner is no longer pressing—because the conduct underlying this distinct claim (AT&T's refusal to lower its rates) was unilateral, and because, as to this refusal, petitioner had "not alleged action by other distributors in concert with AT&T." Pet. App. 7a. Thus, this case presents no opportunity to decide "whether an agreement imposed by one competitor on another to divide a market between them is a unilateral act," Pet. at 15, both because the relationship between petitioner and AT&T was essentially vertical in nature, and because, in all events, the

lower court did not treat the alleged market restriction as a product of unilateral action.[4]

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[4] There is no conceivable merit to petitioner's suggestion, Pet. at 15 n.6, that the decision below conflicts with *Twombly* v. *Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, *Bell Atlantic Corp.* v. *Twombly*, __ U.S. __, 126 S. Ct. 2964 (2006). The Third Circuit did not even mention, let alone rely on, the requirements of Rule 8 in affirming the dismissal of petitioner's antitrust claims.